capacity of the dam limits the right, there may be a wide variation in the actual amount of land flowed. The water may never be raised to the efficient height of the dam, because of waste, leaky condition, etc. Thus a serious increase of actual burden may be inflicted by subsequent repair or economical use. *Cowell* v. *Thayer* (Mass. 1843) 5 Metc. 253. These considerations have led some courts to reject this test of user and substitute the amount of land actually flowed. *Mertz* v. *Dorney* (1855) 25 Pa. 519; *Turner* v. *Hart* (1888) 71 Mich. 130; *Griffin* v. *Bartlett* (1875) 55 N. H. 119. In a recent New York case, *Bremer* v. *Manhattan Ry. Co.* (1908) 38 N. Y. Law Jour. No. 142, the court decided that the user of the plaintiff's easement of light and air was measured by the elevated structure as an entirety, and that an increase in the length and frequency of trains was immaterial. This is correct, if such user is regarded merely as a variation within the same manner of user.

An increased user for a portion of the prescriptive period will usually not affect such as has been continuous for the whole period. *Shaughnessy* v. *Leary, supra; Alcorn* v. *Sadler* (1893) 71 Miss. 634. So a gradual increase in user, though imperceptible, would be inefficient to give a right larger than the initial burden; likewise in the converse case, where there is a gradual decrease, e. g., where a dam constantly deteriorates. See *Stiles* v. *Hooker* (1827) 7 Cowen 266. Where there is a change in user, not a mere increase, the prescription will be interrupted and although some part is common to the two, no prescriptive right as to that part is gained unless it has a separate and severable existence. *Am. Bank Note Co.* v. *N. Y. etc. Ry. Co.* (1891) 129 N. Y. 252.

Power of a Corporation to Act in Chief.—The manifest inability of a purely legal entity to act *in propria persona* has led to the theory which is very uniformly laid down in the text books, that a corporation can perform no act except through an agent, Angell & Ames, Priv. Corps. (5th Ed.) § 224; 1 Spelling, Priv. Corps. §§ 174, 193, 420, the only exception being the vote of the assembled corporators. Angell & Ames, Priv. Corp. *supra.* Whether a given act is in chief or mediate becomes material where the act is required to be performed by the party in interest, or if performed through an agent, to be accompanied by different formalities. In *Bank of U. S.* v. *Danbridge* (1827) 12 Wheat. 64, it was decided that a board of directors acted as the agents of the corporation, and that their act was not that of the corporation in chief. That those acting for the corporation should be considered as, in a sense, the agents of the corporators, is comprehensible, although their powers be determined by the corporate charter, the corporators having only power to choose the persons who shall act. *Fleckner* v. *U. S. Bank* (1823) 8 Wheat. 338; *Dana* v. *Bank of the U. S.* (Pa. 1843) 5 Watts. & Serg. 223; *Burrill* v. *Nahant Bank* (Mass. 1840) 2 Met. 163; *Howland* v. *Myer* (1850) 3 N. Y. 290. But they are considered, not as the agents of the corporators, but of the corporation. *Dana* v. *Bank of the U. S., supra.* As the idea of an agent implies also a principal who is capable of controlling the agent, and as a person can do through an agent only that which he is legally capable of doing

himself, the conception of a purely legal entity, personally incapable of thought or will, acting through an agent, is as objectionable as the conception of such an entity performing a personal act.

While acknowledging that the acts were through an agent, acts of the duly appointed officers of corporations have been considered the equivalent of the personal acts of natural persons, from the necessity of the case, usually because corporations would be otherwise deprived of the benefit of statutes evidently intended to include them. *Trenton Bank* v. *Haverstick* (1829) 11 N. J. L. 171; *New Brunswick etc. Co.* v. *Baldwin* (1834) 14 N. J. L. 440; *Shaft* v. *Phœnix Mut. Life Ins. Co.* (1876) 67 N. Y. 544; *Modesto Bank* v. *Owens* (1898) 121 Cal. 223, 226. In the recent case of *Am. Soda Fount. Co.* v. *Stolzenbach* (N. J. 1907) 68 Atl. 1078, however, Mr. Justice Dill carefully considers the nature of the acts of officers of a corporation in its behalf, and maintains the power of a corporation to act immediately. The case arose under a statute requiring that when a chattel mortgage was recorded by an agent, an affidavit of authority should be attached. The vice-president of a mortgagee corporation recorded a mortgage without such affidavit. The recording was considered valid, as being the act of a corporation in chief, and not through an agent. The court drew a distinction between an agent and an agency. Admitting the inability of a corporation to act *in propria persona*, it considered it as an entity empowered to act through the instrumentality of natural persons, whose acts must be considered those of the corporation itself. In result, the case follows, and is supported by *Am. Insulator Co.* v. *Bankers' etc. Tel. Co.* (N. Y. 1885) 13 Daly 200; *Bank* v. *Hutchison* (1882) 87 N. C. 22. See also *Martin* v. *Atlas Estate Co.* (N. J. 1907) 65 Atl. 881. The agency through which the corporation acts was, however, considered as a merely mechanical instrumentality, as the hand of a man. This theory is open to the same objection as that of a corporation having an actual agent, in that it predicates a will in the corporate entity; an assumption which is contrary to fact, and which should not be made unless commanded by express legislation to that effect. If, however, the agency be conceived of not as a mere instrument, but as independent of a corporate entity, and whose will and acts are attributed to the latter in the same manner that the will of a guardian is attributed to an infant or of a committee to an insane person, and as the knowledge of such officers or agents is attributed to the corporation, the theory is entirely comprehensible and logical, and reaches the same result as under the other conception. But the doctrine would seem applicable only to those who are by statute invested with the corporate powers, and constitute the corporation for the purpose of dealing with others, see 1 Spelling, Priv. Corps. § 420, and not to those acting under delegated authority.

NEGLIGENCE AND CHANGE OF POSITION IN ACTIONS FOR RECOVERY OF MONEY PAID BY MISTAKE.—The basis of the action for the recovery of money paid under mistake of fact being equity and good conscience, the cause of the mistake is immaterial. *Appleton Bank* v. *McGilvray* (Mass. 1853) 4 Gray 518. On this reasoning, *Kelly v. Solari* (1841) 9 M. & W.